

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IVORY TRAYLOR,

Defendant-Appellant.

UNPUBLISHED

August 9, 2007

No. 267863

Wayne Circuit Court

LC No. 05-004289-01

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

During voir dire, the trial court asked if any prospective jurors themselves, or their close family members or friends, had been the victims of a violent crime, and in particular of a crime involving a firearm. A prospective juror answered in the affirmative, asked to be excused, and indicated that three family members had been killed with a knife approximately 11 months earlier. The trial court asked if the juror could decide the case based only on evidence produced during trial and the juror answered, “Most certainly.” Subsequently, the juror gave the trial court her commitment that she would serve fairly and impartially and answered in the negative when defense counsel asked her if she thought that defendant “might be guilty” because he was charged with a crime. Defense counsel did not challenge the juror for cause and did not use a peremptory challenge to excuse the juror.

To establish ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the “counsel” guaranteed by the federal and state constitutions. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel’s deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel’s error, the result of the proceedings would have been different. *Id.* at 600, citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant did not seek a new trial based on the issue of ineffective assistance, and did not move to remand this case to the trial court for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Therefore, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant argues that he was denied the effective assistance of counsel based on counsel's failure either to challenge for cause the juror whose relatives had been murdered, or to use a peremptory challenge to excuse this person from the jury. See MCR 2.511(D) and (E); see also *People v DeHaven*, 321 Mich 327, 334; 32 NW2d 468 (1948). Defendant contends that the error, i.e., the failure to remove the juror, was so egregious that prejudice can be presumed. We disagree.

A criminal defendant has the right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20. The juror at issue asked to be excused, but then, under questioning by the trial court, stated unequivocally that she would decide the case based only on the evidence produced at trial and would act fairly and impartially. The juror made no statements that indicated that her state of mind would prevent her from rendering a just verdict. MCR 2.511(D)(3). The trial court would not have been required to excuse the juror for cause. See *People v Lee*, 212 Mich App 228, 249; 537 NW2d 233 (1995). Thus, defense counsel cannot be deemed to have afforded ineffective assistance by failing to seek the juror's removal for cause. Counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Under these circumstances, defendant's assertion that we must presume that he was denied a fair trial by the juror's presence is without merit.

Defense counsel could have used a peremptory challenge to excuse the juror. However, we presume that counsel's decision to not do so was a matter of trial strategy and we will not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Nothing on the record before us supports a conclusion that had this particular juror been removed, it is reasonably probable that the result of the proceedings would have been different. Defendant has failed to overcome the presumption that counsel rendered effective assistance. *Rockey, supra*.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly